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April 22, 2003

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VIA HAND-DELIVERY

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Suite TW-A325
Washington, DC 20554

APR 22 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA INTERNET (EDWARD.SPRINGER@OMB.EOP.GOV)

Mr. Edward C. Springer
OMB Desk Officer
Office of Management and Budget
Room 10236 NEOB
725 17th Street, N.W.
Washington, DC 20503

Re: Broadcast Station Annual Employment Report

FCC Form 395-B

OMB Control Number: 3060-0390

And

**In the Matter of Review of the FCC's Broadcast and Cable Equal
Employment Opportunity Rules and Policies, MM Docket No. 98-204**

Dear Ms. Dortch and Mr. Springer:

We write this letter on behalf of the National Alliance of State Broadcasters Associations ("NASBA"), the umbrella organization for all the State Broadcasters Associations in the United States, and in Puerto Rico (the "Associations").

Each of the Associations has been established to advance the best interests of the free, local, over-the-air, full service, radio and television broadcast industry both within its borders and at the Federal level. One aspect of this mission is to help broadcast stations to serve the public. Another aspect is to help create and maintain a business and regulatory environment that will allow broadcasters to remain financially healthy and to

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optimize their competitive position in the media marketplace so that they can continue to effectively serve the public. Consistent with these goals, NASBA hereby urges you to reject the captioned Broadcast Station Annual Employment Report, FCC Form 395-B ("395-B Report") proposed by the Federal Communications Commission ("FCC") as contrary to the public interest. **The 395-B Report is unnecessary and therefore unduly burdensome, and would subject stations to pressure to hire minorities that is inconsistent with the Fifth Amendment of the United States Constitution.**

Accordingly, the Report does not comply with the requirements of 5 CFR Part 1320 that collections of information must be necessary for the "proper" function of the FCC and must not be unnecessary or duplicative of information otherwise reasonably accessible to that agency.

To the best of NASBA's knowledge, the 395-B Report proposed by the FCC would require every television and radio station, with minor exceptions, to file annually a detailed form disclosing the racial, ethnic and gender makeup of the station's full-time and part-time staff. The proposed 395-B Report would ask for identification of females, Blacks, Hispanics, Native Americans, Alaskan Natives, Asians and Pacific Islanders, and would counsel that determinations be made "by visual surveys of the work force, or from past employment records.... An employee may be included in the minority group to which she or he appears to belong, or is regarded in the community as belonging." To the best of NASBA's knowledge, the FCC proposes that the 395-B Reports not only be made publicly available at the FCC, but also posted on each station's website, if any.

The proposed 395-B Report is wholly unnecessary and therefore unduly burdensome. Some have argued that the reports are necessary to analyze "industry trends" in the hiring of minorities and women. But companies owning broadcast stations which have 100 or more employees already must file the EEO-1 Report annually with the Equal Employment Opportunity Commission ("EEOC"). The information concerning the race and gender of an entity's employees on the EEO-1 Report is the same as that on the proposed 395-B Report. It is apparent that the FCC could work with the EEOC to collect and scrutinize the information on the EEO-1 Reports as necessary to analyze "industry trends" nationally and even regionally.

More significant, any requirement for the public filing of station-attributed 395-B Reports is not reasonably related to the "proper" function of the FCC since such requirement will impose unconstitutional governmental pressure on stations to recruit and hire on the basis of race and gender, and will thus lead to the grave constitutional

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problems that led the United States Court of Appeals for the District of Columbia Circuit to vacate two earlier FCC affirmative action rules. *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 133 (D.C. Cir.), *reh'g and reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) ("*Broadcasters*"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *reh'g denied* 154 F.3d 487 (D.C. Cir.), *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"). This will be the case even if the Commission pledges not to use the 395-B Reports *directly* to measure a station's performance because the reports will be used by *third-parties before the FCC* in a way that will lead to governmental involvement and, thus, unconstitutional pressure.

The FCC has been making claims since 1970 that data in 395-B Reports is primarily intended to show "industry employment patterns." But the United States Court of Appeals for the District of Columbia Circuit nonetheless correctly found in *Lutheran Church*, 141 F.3d at 353, that the reports *in fact* put pressure on broadcasters to use racial classifications in hiring. Moreover, the court found that the pressures on stations to hire based on race were significant because of the dangers of attracting third-party attention. *Id.* This reality cannot change as long as any rule mandates publicly-available, station-attributed 395-B Reports such as those under review in the captioned proceeding.

Given the sword of Damocles that the FCC wields over its licensees, *see Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 436-437 (1963), no words of assurance are legally adequate to eliminate the clear "pressure" on broadcasters to recruit and hire based on race and gender that public filing of the proposed station-attributed 395-B Reports would create. Indeed, the Minority Media & Telecommunications Council ("MMTC") and 47 other organizations filed a letter at the FCC on October 1, 2002, that provides graphic confirmation that the proposed station-attributed 395-B Reports would violate the central teaching of both *Lutheran Church* and *Broadcasters*.

In that filing, MMTC takes the position that any station that employs a number of minority employees that is lower by a statistical measure than the average number of minorities employed by broadcasters in its market is not merely engaging in discrimination (whether or not consciously) but may be presumed to be an "*intentional discriminator*." The MMTC further states that the Commission's proposed rules do not preclude claims based on statistical evidence of purported discrimination and indeed *cannot* preclude such claims in light of supposedly controlling caselaw. The MMTC could hardly make it more clear that it will examine any publicly available, station-attributed 395-B Reports to find stations whose reports show "underrepresentation" of

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minorities by a statistical test, and that petitions or complaints then be filed against the licenses of those stations on the ground that they are "intentional discriminators." At a minimum, it is clear that the MMTC will use the statistics to target stations for action, and will thus use governmental processes to create pressure on such stations to hire minorities based on their race.

This targeting and resulting underrepresentation complaints will put stations under precisely the sort of illicit pressure to hire minorities that caused the court to find the EEO Rules unconstitutional in *Lutheran Church and Broadcasters*. In the face of the MMTC's targeting, threats and petitions, rational broadcasters will surely be pressured into hiring minorities in sufficient numbers to meet a statistical test -- tantamount to quotas -- so as to avoid petitions to deny and complaints, and the resulting investigations and threats to their licenses.

Indeed, the MMTC has recently filed at the FCC a Petition for Clarification, or, In The Alternative, For Partial Reconsideration, in which it makes clear that it intends to use statistics to test whether stations are "discriminators." This recent filing makes even more plain the grave constitutional problems created by any publicly available, station-attributed 395-B Reports, and makes this letter from NASBA both timely and important for OMB's consideration.

If OMB were now to approve publicly available, station-attributed 395-B Reports, the courts would surely conclude that the Government (a) *knows* the use to which such forms would be put, and (b) is -- at the very least -- acquiescing in the unconstitutional pressure that would thereby be created by third parties. Indeed, especially in light of the MMTC filings, the courts would no doubt hold that the Government was *facilitating* such pressure by requiring publicly available, station-attributable 395-B Reports. For this reason as well as the fact that the 395-B Reports are unnecessary and thus unduly burdensome, NASBA urges OMB to reject any FCC request to approve the 395-B Report.

To be sure, NASBA understands that the FCC may have told OMB that Congress somehow "required" the filing of 395-B Reports. But the FCC adopted the requirement for an annual statistical record showing stations' profiles by race and gender *on its own*, without Congressional mandate, in 1970. 23 FCC 2d 430 (1970). NASBA's research has uncovered no statute mandating that the FCC now require these reports for broadcasters. Indeed, in early 2001, the FCC suspended the previous requirement that

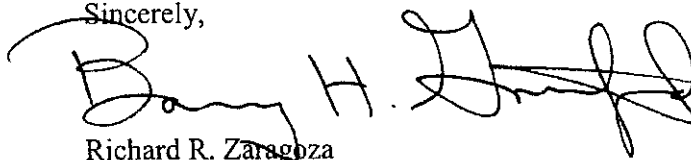
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stations file 395-B Reports, and Congress has taken absolutely no action in the subsequent two years to require their filing on a station-attributed basis or otherwise.

If you have any questions, please feel free to contact either of the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry H. Gottfried", with a stylized flourish at the end.

Richard R. Zaragoza
Barry H. Gottfried

Counsel for the National Alliance of State
Broadcasters Associations

cc: Ms. Judy Boley
Federal Communications Commission
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445 12th Street, SW
Washington, DC 20554
(Via Internet at jboley@fcc.gov)